IN THE

Supreme Court of the United States

October Term, 1956.

No. ~~507~~ 34

WILLIAM J. KERNAN, Administrator of the Estate of Arthur E. Milan, Deceased, and JOHN J. MEEHAN, Administrator of the Estate of Donald H. Worrell, Deceased,

Petitioners,

v.

AMERICAN DREDGING COMPANY, as Owner of the Tug "Arthur N. Herron", In the Matter of the Petition for Exoneration from or Limitation of Liability,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States.

October Term, 1956.

No. 557.

WILLIAM J. KERNAN, ADMINISTRATOR OF THE ESTATE OF ARTHUR E. MILAN, DECEASED, AND JOHN J. MEEHAN, ADMINISTRATOR OF THE ESTATE OF DONALD H. WORRELL, DECEASED,

Petitioners,

v.

AMERICAN DREDGING COMPANY, AS OWNER OF THE TUG "ARTHUR N. HERRON", IN THE MATTER OF THE PETITION FOR EXONERATION FROM OR LIMITATION OF LIABILITY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATUTES INVOLVED.

In addition to the statutes cited by petitioners as involved in the present case the respondent points out that the case also involves the Limitation of Liability Act of the United States. *46 U. S. C. A. 183* et seq., *R. S. 4283* et seq.

COUNTER STATEMENT OF THE CASE.

We believe a counter statement of the case necessary for the reasons suggested in Rule 40(h) (3).

The matter now before the court originated upon the filing by the respondent of a Petition for Exoneration from or Limitation of Liability. [Opinion, D. C., Page 15, Appendix to Petition R. I.] The origin of the litigation was a fire on the surface of the Schuylkill River in Philadelphia on the night of November 18, 1952. A tugboat, owned by the respondent, was pulling a loaded mud scow when the surface of the river suddenly burst into flame. As the District Court [Kirkpatrick, Ch. J.] found:

> "As she (the tug) was passing the refinery of the Gulf Oil Company, the men on board her heard a rumbling sound and, without other warning, the surface of the river around the tug suddenly burst into flames, enveloping the tug and barge in a sea of fire, with flames rising to a height far above the deck of the tug and completely shutting off the view of those on board in every direction. The tug caught fire and portions of it, including the entire wheelhouse, were destroyed."

The cause of the fire was

> "the ignition of highly inflammable vapor lying above an extensive accumulation of some petroleum product spread over the surface of the river." [D. C. Opinion, Page 16, Appendix to Petition.]

Presumably, the "petroleum product" was gasoline, naphtha or some similar volatile product which had been allowed to escape from a nearby refinery. That, at least, is the claim asserted by these same petitioners in suits instituted against Gulf Oil Corporation in the same court. The Complaints in these actions are printed as an appendix to this brief. We are informed that trial of these actions

against Gulf Oil Corporation has been stayed until the termination of this case upon application of counsel for the petitioners, concurred in by counsel for Gulf Oil Corporation.

The river at the point of the fire is wide and deep. It accommodates ocean going vessels. The respondent's tug had ascended the river, past the scene, a short time before. It had delivered an empty scow to the scene of dredging operations being performed a mile or so away and then started down river with a scow loaded with mud being towed alongside the tug.

A refinery operated by Gulf Oil Corporation is situate along one bank of the river. Along the river it covers a distance of almost a mile, most of which is down river from the point where this fire occurred.

Ships were loading and unloading petroleum products at quays at the Gulf plant, but as the District Court found [Opinion, Page 20, Appendix to Petition] the nearest of these was 3400 feet away from the tug and it would have taken the tug five to ten minutes to cover that distance.

There is no evidence that the volatile petroleum product came from one of the ships being loaded or unloaded. As a matter of fact there is no evidence in this case as to where it came from nor how long it had been upon the surface of the river, although other physical factors indicate that it must have been present but a brief period before it ignited.

The lantern carried by the barge was the customary and well recognized type used for the purpose of lighting scows, barges and other small craft. The use of a lantern is contemplated by the navigation statutes upon waters such as the river in question. *33 U. S. C. A. 177.*

We are not clear from the Petition and particularly from the statement of the case therein [Petition, Pages 4 and 5] whether petitioners ask that this court re-determine all of the issues which were urged by petitioners and decided adversely to them at the trial level. We rely, how-

ever, upon this court's decision in *McAllister v. United States*, 348 U. S. 19 and refrain from answering them further except to point out that for the most part the petitioners' statement of the case can hardly be called an unbiased presentation or a fair summary of the evidence or the findings of the trial court. They represent, for the most part, the petitioners' original evidence and arguments upon fact questions which were determined adversely to the petitioners by the trial court.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED.

Summary of Argument.

1. The courts below did not, as petitioners assert, base decision upon the premise "that fault or knowledge is essential to establish liability" [Petition, Page 7] under the doctrine that a shipowner is said to "warrant the seaworthiness" of his vessel.

2. The petitioners point out no conflict between circuits upon the questions which they assert are presented by the Petition. Nor do they, in fact, point out any conflict between the decisions in the courts below and any decision of this court.

3. The questions which the petitioners seek to present are not of national importance nor would they have, if decided by this court, any substantial impact upon claims of other classes. The most unusual circumstances of this accident make it sui generis and the case was decided in accordance with well established and universally recognized principles.

4. The case was decided below upon fundamental legal principles which were correctly applied to the factual situation as found by the trial court.

Argument.

I.

It is asserted by the petitioners that the courts below erred in that they based decision upon the premise "that fault or knowledge . . . is essential to establish liability under the warranty of seaworthiness." [Petition, Page 7.]

The courts below did not so hold. A review of the decisions will demonstrate the accuracy of this statement.

The trial court held that this respondent, a petitioner for exoneration from or limitation of liability, had carried the burden of proof imposed upon it and had established "seaworthiness" in fact. In reaching its finding on this point the trial court did not advert to nor consider "fault or knowledge."

The petitioners rely for its argument and quote [Petition, Page 10] a section of the District Court's decision wherein the court, having already decided the unseaworthiness point, was turning to other possible grounds of liability. That is perfectly plain from a reading of the decision and the excerpt from the Petition, taken out of context, does not fairly or accurately support the argument which petitioners make when it is considered in context.

The District Court found that a regulation of the Coast Guard promulgated solely "for preventing collisions"[1] had not been complied with in that lights were carried three feet above the water instead of eight feet. It cited fundamental treatises and said "there seems to be no disagreement among the authorities." [District Court Opinion,

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1. 33 U. S. C. A. 154. It was pursuant to the authority of the power to establish navigation rules granted in 33 U. S. C. A. 157, that the rule in question was established. The Commandant of the Coast Guard has succeeded the Supervising Inspector General referred to in the statute.

Page 18, Appendix to Petition]. It found that the regulation was solely for the prevention of collisions, *and for no other purpose.*

The District Court was fully justified in concluding as it did with respect to the height of the lights. The use of lanterns was sanctioned by custom, practice and statute. *(33 U. S. C. A. 177.)*

Perhaps the clearest indication that the District Court was right in holding that the Coast Guard regulation "had to do solely with navigation and was intended for the prevention of collisions and for no other purpose," [D. C. Opinion Petition, Pages 17 and 18] is by comparing these rules with the rules applicable to other inland waters. In most respects the navigation regulations promulgated for the Hudson River are identical with the ones with which we are here dealing applicable, inter alia, to the Schuylkill and Delaware Rivers. There is a difference with respect to the height above the water at which lights on barges shall be carried. The so-called Hudson River rules do not require lights to be at any particular height. The Hudson River is almost perfectly straight. In contrast, the Delaware and Schuylkill Rivers have numerous bends, and frequently low bottom land will permit one vessel to observe the lights of another around one of these bends, depending upon the height of the lights.

At no point did either court below predicate decision on the question of unseaworthiness upon the necessity for "fault and knowledge" in the respondent. The petitioners create paper tigers, call upon language from decisions, *Mahnich v. Southern S. S. Co.*, 321 U. S. 96; *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, where this court was considering situations not even remotely similar to the case at bar, borrow language from them, and by so doing seek to destroy the dragons which they themselves have created.

The petitioners really quarrel with the finding of the fact of seaworthiness.

II.

In the second point in their Petition the petitioners seek to convince this court that there is conflict between the decision below and this court's decisions in *Davis v. Wolf*, 263 U. S. 239 and *Coray v. Southern Pacific Co.*, 335 U. S. 320. There is no conflict between the decisions below and any decision of this court or any other court, either under the Federal Employers' Liability Act, the Safety Appliance Act or any other act.

In the *Davis* and *Coray* cases this court was considering actions brought under the Safety Appliance Act where there had, in fact, been violations of that act.

The Congressional history and a long series of decisions by this court permit these conclusions to be drawn with respect to that act.

1. The intent of the Safety Appliance Act was to require the railroads to abolish sub-standard equipment;

2. for the purpose of preventing injury;

3. A cause of action was created where none theretofore existed;

4. in favor of all employees injured by reason of the use by the employer of sub-standard equipment.

Contrast that with a rule promulgated solely to regulate navigation at night and prevent collision between vessels. The Coast Guard regulation had no other purpose. Nothing in the rules or their long history in the courts even remotely suggests that they were intended to guard against the possibility that the height of a navigation light would avoid ignition of a fire on the surface of a navigable stream or any similar harm not stemming from the navigation and visibility of the vessel.

The courts below, therefore, rightly concluded that the Coast Guard regulation was totally dissimilar to the Safety

Appliance Act and they applied well recognized and established criteria in reaching that result.

Almost fifty years ago this court said:

> "when a duty [2] is imposed for the purpose of preventing a certain consequence, a breach of it that does not lead to that consequence does not make a defendant liable *for the tort of a third person* merely because the observance of the duty might have prevented that tort."
>
> [Emphasis ours.]

The Eugene Moran, 212 U. S. 466 (Holmes, J.).

The principle enunciated was not new then and has not changed since. It was and is the rule in England. *Garris v. Scott*, L. R. 9, Exch. 125; *Ward v. Hobbs*; L. R. 4, App. Cas. 13, 23.

The statute, 33 U. S. C. A. 154, under which the Coast Guard regulation here involved was promulgated, clearly states that the regulations are for "preventing collisions." The Safety Appliance Act was intended for an entirely different purpose and conflict between the holdings below and any decision of this court simply does not exist. As the District Court said "there seems to be no disagreement among the authorities" and, in fact, there is not.

The courts below reached a correct conclusion and it does not require re-examination by this court.

III.

The petitioners cite no authority nor any examples of what they call "the tremendous impact" (Petition, page 14) of the decision below upon claims of all seamen and longshoremen. We do not believe there is any such impact.

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2. The court was discussing the identical question involved here, i.e., navigation lights required on scows at night under the regulations predecessor to the ones promulgated by the Coast Guard.

The legal principles applied by the courts below are well recognized and well established and it would only be if those rules were to be changed that there would be any far reaching impact upon litigants generally.

IV.

As one analyzes the decision of the District Court it becomes increasingly plain that the Court of Appeals reached the correct conclusion when it said that the fact findings of the District Court were well within the province of that court as a fact finder and that the conclusions of law which the District Court reached were correct.

Perhaps the split in the Court of Appeals on the question of whether or not rehearing should have been granted may have come about by reason of the fact that in considering the petition for rehearing the Court of Appeals had before it only the petition, no answer to it having been filed by respondent.

It is plain from reading the decision of the District Judge that he first considered whether unseaworthiness existed and decided that question adversely to the petitioners. In doing so he applied to the Coast Guard regulation all of those tests which are recognized where liability is attempted to be asserted upon the ground that a statute, ordinance or regulation has been violated.[3] It followed such well known decisions in the field of limitation of liability as *The Princess Sophia*, 61 F. (2d) 339 and *The Lusitania*, 251 Fed. 715.

After considering whether or not unseaworthiness existed in fact, the court turned to the question of whether negligence existed. It held that it did not. In so doing it applied well defined and well recognized tests. The legal principle underlying the decision below is the same basic principle underlying *Palsgraf v. Long Island R. Co.*, 248

3. Schneider—Negligence by Violation of Law, 11 Boston University L. R., 217; Kuehner—Violation of a Statute or Ordinance as Evidence of Negligence, 36 Dickinson Law Rev. 192.

N. Y. 339; 162 N. E. 99.[4] Just as "proof of negligence in the air, so to speak, will not do"[5] so proof of violation of regulation in the air, so to speak, will not do, and that is what has been held in the present case.

CONCLUSION.

There is nothing in the case at bar which recommends it for review by this court. No sound reason is advanced for the attempt to hold this respondent liable in damages for what is clearly the negligence of a third person. The petitioners really do not quarrel with the fundamental law which the courts below applied so much as they quarrel with the findings of fact. Since, under this court's decision in *McAllister v. United States*, 348 U. S. 19 at 20, this court stands in the same position as the Court of Appeals and will not set aside findings of fact which are not clearly erroneous, and the petitioners nowhere urge that there is not substantial evidence to support all of the findings of the trial court, there is no question requiring review by this court.

Respectfully submitted,

T. E. Byrne, Jr.,
Counsel for Respondent.

Mark D. Alspach,
Krusen, Evans & Shaw,
Of Counsel.

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4. Dean Prosser has referred to the Palsgraf case as "perhaps the most celebrated of all tort cases." 52 Mich. L. R. 1.

5. Pollock—Torts, 11th Edition, Page 455.

Appendix.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION NO. 15908.

WILLIAM J. KERNAN, ADMINISTRATOR OF THE ESTATE OF ARTHUR E. MILAN, DECEASED, AND WILLIAM J. KERNAN, ADMINISTRATOR AD PROSEQUENDUM OF THE ESTATE OF ARTHUR E. MILAN, DECEASED

v.

GULF OIL CORPORATION.

COMPLAINT.

Jury Trial Demanded.

William J. Kernan, Administrator of the Estate of Arthur E. Milan, Deceased, and William J. Kernan, Administrator Ad Prosequendum of the Estate of Arthur E. Milan, Deceased, claim of the defendant, Gulf Oil Corporation, the sum of One Hundred Fifty Thousand ($150,000.00) Dollars, upon a cause of action whereof the following is a true statement:

1. Plaintiff, William J. Kernan, was appointed Administrator of the Estate of Arthur E. Milan, Deceased, on the 17th day of December, 1952, on the order of the Surrogate, County of Burlington, State of New Jersey.

2. Plaintiff, William J. Kernan, was appointed Administrator Ad Prosequendum of the Estate of Arthur E. Milan, Deceased, on the 31st day of December, 1952, on the

order of the Surrogate, County of Burlington, State of New Jersey.

3. Plaintiff is a citizen and resident of the State of New Jersey.

4. Defendant, Gulf Oil Corporation, is a corporation duly organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania.

5. Plaintiff, upon information and belief, avers that at all times hereinafter mentioned, American Dredging Company possessed, owned, operated and controlled the Tug "Arthur N. Herron" and Scow No. 122, operating upon navigable waters of the United States.

6. On or about November 18, 1952, defendant, Gulf Oil Corporation, owned, possessed, operated and controlled certain storage tanks, unloading docks and refinery facilities and appurtenances on premises located on the east bank of the Schuylkill River near the Penrose Avenue Bridge; and also several large pipelines passing under and across the said Schuylkill River, all for the handling, storage and processing of oil and oil products and other combustible and explosive materials.

7. On or about November 18, 1952, and at all times mentioned herein, plaintiff's intestate, Arthur E. Milan, was employed by American Dredging Company, as a member of the crew of the Tug "Arthur N. Herron", in the capacity of Chief Engineer.

8. On or about November 18, 1952, the Tug "Arthur N. Herron" took in tow the Scow No. 122 at or near Point Breeze, moored on the tug's port side, and was proceeding down the Schuylkill River to Mantua Creek. At or about 10.30 P. M., at or near the said Penrose Avenue Bridge, the tug and her tow came into contact with a large body of oil or other explosive or combustible liquid on and about the surface of the water, and the said oil or other explosive

or combustible liquids burst into flames, engulfing the tug and tow.

9. At the time and place aforesaid, plaintiff's decedent, while engaged in the performance of his duties, was suddenly exposed to the said explosions and fire and was ordered to abandon the vessel and to jump into the Schuylkill River, as a result of which he subsequently drowned.

10. Disregarding its duties in the premises, defendant, Gulf Oil Corporation, by its agents, servants and employees, was careless and negligent in:

(a) failing to take adequate and proper precautions for the transfer, storage and processing of oil and oil products and other explosive and combustible materials on its said premises;

(b) failing to provide proper means for the transfer, storage and processing of oil and oil products and other explosive and combustible materials on its said premises;

(c) causing, permitting and/or allowing the said oil and oil products and other explosive and combustible materials to be discharged or flow into or on or about the Schuylkill River from its facilities and premises;

(d) failing to warn plaintiff's decedent and others similarly situated on the premises of oil and oil products and other explosive and combustible materials on and about the Schuylkill River;

(e) causing and permitting the explosions and fire as aforesaid;

(f) failing to make sufficient, adequate and proper efforts to rescue the decedent, under the circumstances;

(g) failing to maintain a proper and adequate watch and lookout under the circumstances.

11. As a further consequence of the negligence of the defendant, plaintiff avers that the decedent suffered severe and agonizing pain, shock and mental anguish before he died.

12. At the time of the decedent's death, he was a strong, robust and able-bodied man, with the prospect of substantial advancement and earning capacity.

13. During the entire period of decedent's employ by American Dredging Company, he well and truly performed all his duties in a capable and satisfactory manner, and was obedient to all lawful commands of the officers of the Tug "Arthur N. Herron".

14. The decedent left surviving him his widow, Viola V. Milan, and other relatives who suffered pecuniary loss by reason of the death of the decedent.

15. Plaintiff claims damages on behalf of the surviving next-of-kin and heirs-at-law to the extent of their pecuniary loss, and further claims damages which the decedent would have been entitled to receive had he not died, and claims, further, the funeral expenses.

WHEREFORE, plaintiff claims the sum of One Hundred Fifty Thousand ($150,000.00) Dollars and brings this action to recover same from the defendant.

FREEDMAN, LANDY AND LORRY,

By WILLIAM M. ALPER,
Attorneys for Plaintiff.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION NO. 16001.

JOHN J. MEEHAN, ADMINISTRATOR OF THE ESTATE OF DONALD H. WORRELL, DECEASED

v.

GULF OIL CORPORATION.

COMPLAINT.

Jury Trial Demanded.

John J. Meehan, Administrator of the Estate of Donald H. Worrell, Deceased, claims of the defendant, Gulf Oil Corporation, the sum of Two Hundred Fifty Thousand ($250,000.00) Dollars, upon a cause of action whereof the following is a true statement:

1. Plaintiff, John J. Meehan, was appointed Administrator of the Estate of Donald H. Worrell, Deceased, on the 22nd day of October, 1953, on the order of the Register of Wills, Philadelphia, Pennsylvania.

2. Plaintiff is a citizen and resident of the State of New Jersey.

3. Defendant, Gulf Oil Corporation, is a corporation duly organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania.

4. Plaintiff, upon information and belief, avers that at all times hereinafter mentioned, American Dredging Company possessed, owned, operated and controlled the Tug "Arthur N. Herron" and Scow No. 122, operating upon navigable waters of the United States.

5. On or about November 18, 1952, defendant, Gulf Oil Corporation, owned, possessed, operated and controlled certain storage tanks, unloading docks and refinery facilities and appurtenances on premises located on the east bank of the Schuylkill River near the Penrose Avenue Bridge; and also several large pipelines passing under and across the said Schuylkill River, all for the handling, storage and processing of oil and oil products and other combustible and explosive materials.

6. On or about November 18, 1952, and at all times mentioned herein, plaintiff's intestate, Donald H. Worrell, was employed by American Dredging Company, as a member of the crew of the Tug "Arthur N. Herron".

7. On or about November 18, 1952, the Tug "Arthur N. Herron" took in tow the Scow No. 122 at or near Point Breeze, moored on the tug's port side, and was proceeding down the Schuylkill River to Mantua Creek. At or about 10.30 P. M., at or near the said Penrose Avenue Bridge, the tug and her tow came into contact with a large body of oil or other explosive or combustible liquid on and about the surface of the water, and the said oil or other explosive or combustible liquids burst into flames, engulfing the tug and tow.

8. At the time and place aforesaid, plaintiff's decedent, while engaged in the performance of his duties, was suddenly exposed to the said explosions and fire as a result of which he lost his life.

9. Disregarding its duties in the premises, defendant, Gulf Oil Corporation, by its agents, servants and employees, was careless and negligent in:

(a) failing to take adequate and proper precautions for the transfer, storage and processing of oil and oil products and other explosive and combustible materials on its said premises;

(b) failing to provide proper means for the transfer, storage and processing of oil and oil products and other explosive and combustible materials on its said premises;

(c) causing, permitting and or allowing the said oil and oil products and other explosive and combustible materials to be discharged or flow into or on or about the Schuylkill River from its facilities and premises;

(d) failing to warn plaintiff's decedent and others similarly situated on the premises of oil and oil products and other explosive and combustible materials on and about the Schuylkill River;

(e) causing and permitting the explosions and fire as aforesaid;

(f) failing to make sufficient, adequate and proper efforts to rescue the decedent, under the circumstances;

(g) failing to maintain a proper and adequate watch and lookout under the circumstances.

10. As a further consequence of the negligence of the defendant, plaintiff avers that the decedent suffered severe and agonizing pain, shock and mental anguish before he died.

11. At the time of the decedent's death, he was a strong, robust and able-bodied man, with the prospect of substantial advancement and earning capacity.

12. During the entire period of decedent's employ by American Dredging Company, he well and truly performed all his duties in a capable and satisfactory manner, and was obedient to all lawful commands of the officers of the Tug "Arthur N. Herron".

13. The decedent left surviving him his widow, Elizabeth M. Worrell and two minor children, Elizabeth M.

Worrell and June Worrell, who suffered pecuniary loss by reason of the death of the decedent.

14. Plaintiff claims damages on behalf of the surviving next-of-kin and heirs-at-law to the extent of their pecuniary loss, and further claims damages which the decedent would have been entitled to receive had he not died, and claims, further, the funeral expenses.

WHEREFORE, plaintiff claims the sum of Two Hundred Fifty Thousand ($250,000.00) Dollars and brings this action to recover same from the defendant.

FREEDMAN, LANDY AND LORRY,

By WILLIAM M. ALPER,
Attorneys for Plaintiff.